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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
No.

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN and CLARENCEVILLE SCHOOL DISTRICT OF OAKLAND AND WAYNE COUNTIES, MICHIGAN,

Petitioners,

v.

THE HONORABLE STEPHEN J. ROTH, District Judge for the Eastern District of Michigan, Southern Division,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, West Bloomfield School District and Clarenceville School District, respectfully pray that a Writ of Certiorari issue, to review an Order of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause denying Petitioners' Petition for Writ of Prohibition and Mandamus and from its Order Denying the Petition for Rehearing.

OPINIONS BELOW

The opinions rendered in the District Court and in the Court of Appeals for the Sixth Circuit below are:

a. Order of June 14, 1972 of the Trial Judge, Honorable Stephen J. Roth, District Judge for the Eastern District of Michigan, Southern Division, a copy of which is attached as

Appendix A.

b. Order of the Court of Appeals for the Sixth Circuit, of July 17, 1972, denying Petition for Writ of Prohibition and Mandamus, a copy of which is attached as Appendix C.

c. Order of the Court of Appeals for the Sixth Circuit, of August 24, 1972, denying Petition for Rehearing of Petition for Writ of Prohibition and Mandamus, a copy of which is attached as Appendix E.

JURISDICTION

The Order denying the Petition for Writ of Prohibition and Mandamus was entered July 17, 1972. Petition for Rehearing was timely filed. The Order denying Petition for Rehearing was entered August 24, 1972.

The jurisdiction of this Court to issue the requested Writ of Certiorari is conferred by 28 U.S.C. Sec. 1254.(1)

QUESTIONS PRESENTED FOR REVIEW

1. Does the dismissal by the Court of Appeals of the Petition for Writ of Prohibition and Mandamus by West Bloomfield School District and Clarenceville School District directed to the Trial Court where said Trial Court has included the Petitioning School Districts in a desegregation order where said School Districts have not been served with process; are not parties to the principal suit in the District Court and have not intervened therein, constitute a denial of Petitioners rights under the United States Constitution and a denial of due process and equal protection of the laws?

2. Where the Sixth Circuit Court of Appeals, without hearing or opinion, dismisses the Petition for Writ of Prohibition and Mandamus, which Petition challenges the jurisdiction of the Trial Court to extend its desegregation remedy to include school districts which are not now, nor have been in the past, a part of the School District of the City of Detroit, where the Trial Court's findings of segregation are limited to policies and practices solely within the City of Detroit School District, is the refusal of the appellate court to grant said Petition a denial of due process as to

these petitioners?

3. Did the Court of Appeals err in refusing to issue its Writ of Prohibition to the Trial Court where the District Court seeks to include a school district, an agency of the State of Michigan, within the scope of the orders of the Trial Court where neither the State of Michigan nor said School District are parties to, or intervenors in, said litigation from which the challenged order flows?

4. Where the orders of the Trial Court in a desegregation case challenges the constitutionality of the Constitution and school laws of the State of Michigan; enjoins the operation of state laws pertaining to the operation of state school laws within some fifty-two (52) school districts in the State was the failure of the Trial Court to impanel a three judge court under 28 U.S.C. 2281 jurisdictionally fatal requiring the granting of the Writ of Prohibition and Mandamus by the Court of Appeals?

STATEMENT OF CASE

Petitioning School Districts are both Michigan Municipal Corporations and School Districts of the Third Class, organized under the laws of the State of Michigan. West Bloomfield School District is located in northwest Oakland County and serves some 5500 students. It was created in 1947. Clarenceville School District was established as a Fractional School District No. 5 of Farmington Township in 1837. The School District has some 3,600 students and portions of the District lie in both Wayne and Oakland Counties, outside the City of Detroit.

Certain Plaintiffs (Ronald Bradley, et al) brought a suit in August 1970 against the Detroit Board of Education and certain State officers seeking a judgment that Act 48 of Public Acts of 1970 of the State of Michigan be declared unconstitutional and requesting that Detroit School District be operated as a unitary system. Petitioning School Districts were not named as parties in such litigation.

In September 1971, the Trial Court found that the Defendant Board of Education of the Detroit School District had committed acts, countenanced by State officer Defendants, which resulted in de jure segregation of Detroit schools. The findings are reported in

Bradley et al v. *Milliken et al* 338 F. Supp. 582.594 (E.D. Mich. 1971). On June 14, 1972, after additional testimony, the Trial Court ordered the petitioning School Districts (and some fifty other districts) included in a so-called "Metropolitan" desegregation plan. No finding of the Trial Court suggests that the failure to maintain a unitary system in Detroit was caused by, or attributable to, the creation of the petitioning School Districts or any other such independent school districts in the so-called Metropolitan area of Detroit and located in the Counties of Oakland, Macomb and Wayne. On June 14, 1972, the Trial Court, in its Findings justifying the so-called "Metropolitan Plan", specifically stated that no proofs had been taken on the establishment of the boundaries of the 86 Districts in Wayne, Oakland and Macomb Counties, and further, made no finding that the school districts (other than the Detroit School District) had committed acts of de jure segregation.

The Trial Court, however, included West Bloomfield School District and Clarenceville School District (and other School Districts) in the so-called "Metropolitan Plan". All the Districts so included are located without the boundaries of the Detroit School District. The boundaries of the Detroit School District are coterminous with the boundaries of the City of Detroit. The petitioning School Districts, West Bloomfield School District and Clarenceville School District, are not parties to the litigation; nor, did such districts intervene therein. Nonetheless, the petitioning Districts were ordered, inter alia, to "cooperate" with the Trial Court appointed panel, pay costs of its employees' assistance to such panel and participate in the reassignment of pupils within the "desegregation area" (Appendix A, page 4a).

The petitioning School Districts contend, that the inclusion of said Districts with the Desegregation plan, without notice; without process; without hearing, by the Trial Court, and the failure of the Circuit Court of Appeals to issue a Writ of Prohibition and Mandamus to the Trial Court, constitutes a denial of constitutional guarantees to due process and a total abandonment of traditional concepts of notice, and right to hearing on the merits.

REASONS FOR GRANTING WRIT

[For purposes of brevity, Question I, II and III presented for

review are treated collectively.]

In order that Petitioners' argument may be viewed in proper perspective, some information is necessary to properly portray the position of the petitioning School Districts and the litigation which caused the Districts to seek the issuance of an extraordinary Writ of Prohibition. The indulgence of the Court is solicited to permit the Petitioners to recite a brief, but hopefully, informative history of the principal litigation.

The principal litigation action was commenced by filing of a Complaint by the Plaintiffs, Ronald Bradley et al, on August 18, 1970. No amended or supplemental Complaint has ever been filed in the District Court in the principal litigation. The Defendants named in the Complaint are the Governor of the State of Michigan, the Attorney General of the State of Michigan, the Michigan State Board of Education, the Superintendent of Public Instruction for the State of Michigan, the Board of Education of the City of Detroit and its individual members and the then Superintendent of the Detroit Public Schools. No school district other than the City of Detroit school district was named as a defendant. The thrust of the Complaint was a judgment that Act 48 of Michigan Public Acts of 1970 be declared unconstitutional and to require the operation of the public schools in the City of Detroit on a unitary basis. The Plaintiffs claimed only that the City of Detroit school district was not operated on a unitary basis and the relief sought was limited to the City of Detroit school district. The Plaintiffs' Complaint, and the finding of the Trial Court related in its Ruling on segregation, dated September 27, 1971 and detailed in 338 F. Supp. 582, (1971) is that the Detroit School District has not been *operated* on a unitary basis.

As indicated above, there has been no Complaint and no finding by the Trial Court that any of the fifty-two (52) independent school districts, selected by the District Court as a part of its desegregation plan, were established in furtherance of a policy to encourage segregation and, as heretofore noted, the Trial Court candidly recognized the lack of proofs with respect to the establishment of the boundaries of the eighty-six (86) public school districts within the Counties of Wayne, Oakland and Macomb and the lack of proofs as to whether or not such school

districts, other than Detroit School District, had committed any acts of de jure segregation. In *Bradley* v. *Milliken et al*, 345 F. Supp. 914 (E.D. Mich. 1972) the Trial Court stated:

"It should be noted that the Court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." Bradley, supra, 920.

Notwithstanding the limitations imposed by its own findings, the Trial Court included West Bloomfield School District and Clarenceville School District within the boundaries of its proposed Metropolitan Plan to accomplish desegregation of the Detroit School District. *Bradley et al* v. *Milliken et al*, June 14, 1972, supra.

In response to these findings of fact and the resultant Order, including the sweeping provisions therein, the School Districts of West Bloomfield and Clarenceville filed a joint Petition for Writ of Prohibition in the Court of Appeals for the Sixth Circuit, which Petition and a subsequent Petition for Rehearing were ultimately denied by that Court on July 17, and August 24, 1972 respectively.

School districts of the State of Michigan are municipal corporations, or, at the very least, quasi municipal corporations. *Marathon School District No. 4* v. *Gage*, 39 Mich 484 (1878) and *King* vs. *School District No. 5*, 261 Mich 605 (1933).

School districts derive their power and authority from the Constitution of the State and legislature. *Board of Education of Detroit* v. *Superintendent of Public Instruction*, 319 Mich 436 (1947). As indicated by the quoted section of the General School Code, each school district has the power to "sue and be sued in its name". Section 352 Public Act 269 of Public Acts of 1955; MCL 1948, §340.352. (Appendix F, page 56a)

It must be noted that the State of Michigan is not a party to this litigation. The officers of the State, including the Governor and the Attorney General and the Superintendent of Public Instruction, have no plenary powers as to the petitioning School

Districts under the Michigan Constitution. The State Board of Education has "leadership and general supervision over all public education" and serves as a "general planning and coordinating body for all public education" (Reference, Article VIII, §3 Michigan Constitution and §582 Act 269 of Public Acts of 1955; MCL 1948 §340.582.) The State Defendants have no authority to require local districts to admit nonresident pupils to the school district. That authority is vested in the legislature of the State of Michigan which has provided specific statutory authority and control of such transfers to be vested in the local school district. The Michigan Supreme Court in *Jones* v. *Grand Ledge Public Schools*, 349 Mich 1 (1957), stated as follows:

> "We are in accord with the finding of the trial judge that under the present school code the defendant school district is not charged with the duty of accepting nonresident pupils. The language of the statute must be construed as it reads. It is not within the province of this Court to read therein a mandate that the legislature has not seen fit to incorporate. Our duty is to apply the law as we find it. . . ." (p.11)

The constitutional character of Michigan school districts has been recognized in the *Detroit Board of Education* v. *Superintendent of Public Instruction*, 319 Mich 436 (1947). In that case, the Supreme Court of the State of Michigan found unconstitutional (under the Michigan Constitution of 1908) an attempt by the State legislature to create a statewide school district to share in sales tax revenues then provided by provision of the 1908 Constitution. A similar provision reflecting the constitutional nature of local school districts is found in Section 11, Article IX of the present Michigan Constitution.

Each school district in Michigan is charged with the responsibility of providing education to its pupils without discrimination. Section 2 of Article VIII succinctly defines that duty as follows:

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." (Michigan Constitution Appendix F, page 55a)

The Trial Court relied upon *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), as precedent for including districts, other than the school district of Detroit, in its Metropolitan plan. *Hunter*, supra, is not precedent for the Trial Court's interpretation. To the contrary, the case clearly stands for the proposition that a state legislature may modify its municipal subdivision including the boundaries thereof. Nowhere in *Hunter*, supra, is there the suggestion that this power is somehow conferred upon a United States District Court. The Trial Court likewise relied heavily upon the District Court decision in *Bradley et al* v. *School Board of the City of Richmond*, 338 F. Supp. 67 (1972).

On June 5, 1972, the court was reversed by the Court of Appeals for the Fourth Circuit in *Bradley et al* v. *Richmond*, 462 F. 2d 1058 (CA 4th 1972). It is interesting to note, that the Fourth Circuit, in reversing the judgment of the lower court, relied upon *Hunter*, supra, as precendent for its reversal.

The Trial Court also relied upon *Swann* v. *Charlotte Mechlenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267 (1971), but in so doing, the Trial Court clearly ignored the explicit judicial admonition of *Swann*.

"*. . . However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.* The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

"*In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary.* Judicial authority enters only when local authority defaults." (Emphasis Supplied) (p. 16)

It must be reiterated that West Bloomfield School District and Clarenceville School District are not litigants in the present principal case. The issuance of a Writ of Prohibition and Mandamus has traditionally been the manner in which the appellate courts have restricted and precluded the unwarranted exercise of jurisdiction by a lower court. "The historic use of writs of prohibition and

mandamus directed by an appellate to an inferior court has been to exert the revisory of appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction. . . .", *Ex Parte Republic of Peru*, 318 U.S. 577, 582 (1942).

The action of the Trial Court in including the petitioning School Districts as a part of its desegregation plan in the absence of due process or notice, constitutes the improper exercise of jurisdiction by the District Court. The Circuit Court of Appeals, by dismissal of the Petition for Writ of Prohibition has, apparently, given its approbation to the actions of the Trial Court. It is submitted that the Supreme Court, in its exercise of its supervisory powers over the Federal Judiciary, should grant certiorari and settle the basic and critical decision as to the jurisdiction, or lack thereof, of the Trial Court over the petitioning School Districts.

* * *

Petitioners allege that the Trial Court erred in failing to impanel a three judge court pursuant to 28 U.S.C. 2281, cited above. Notwithstanding that the Complaint of the Plaintiffs was confined to a statute to Act 48 of Public Acts of 1970 of the State of Michigan, which affected the Detroit School District only, the Trial Court, on its own, without the benefit of amended pleadings, increased the scope of the litigation to involve school districts outside of the geographical limits of the City of Detroit and the Detroit School District. On June 14, 1972, the Court entered its Order for the development of the so-called "Metropolitan" desegregation plan, which include requirements for student reassignment, faculty and staff reassignment, restrictions on construction of school buildings and provisions for recommendations of alteration of local school district boundaries. (Reference, Appendix A, page 4a-9a)

The referenced Order likewise directs the State Superintendent of Public Instruction to make recommendations to the Trial Court concerning the foregoing matters and with reference to existing laws of the State of Michigan pertaining to the affected school districts, including these Petitioners, directs the Superintendent as follows:

"In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court, may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, *where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary.* In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation." (Emphasis supplied) (Reference Appendix A, page 8a)

The quoted language of the Order is an open invitation to a State officer to make recommendations to the Trial Court for entry of orders contrary to the laws of the State of Michigan. A review of the Order of June 14, 1972 demonstrates that it is in fact a mandatory injunction enjoining the Petitioning School Districts from fulfilling the statutory duties and responsibilities required under various sections of the General School Code of 1955 being Public Act 269 of Public Acts of 1955 of the State of Michigan, as amended, including the education of resident pupils (MCLA 340.356); Employment of staff (MCLA 340.569) etc. (Reference Appendix B, page 31a) Such injunction must be predicated upon the purported unconstitutionality of such statutes, vis-a-vis the Plaintiffs, in the principal litigation. It is the contention of the Petitioners that a three judge court was required to be impanelled by the Trial Court under 28 U.S.C. §2281.

The legislative history of Section 2281, and its historical antecedents, is detailed in *Swift and Co.* v. *Wickham*, 382 U.S. 111, 86 S. Ct. 258 (1965). *Florida Lime and Avacado Growers* v. *Jacobsen*, 362 U.S. 73, 80 S. Ct. 568 (1959), recognized the congressional policy inherent in the enactment of the statute to require a three judge court whenever a state statute was to be enjoined on the grounds of federal unconstitutionality. The applicability of Section 2281 in civil rights cases, and more specifically in school desegregation cases, is apparent. *Brown* v. *Board of Education*, 349 U.S. 294 (1955) and its companion Federal cases came to the United States Supreme Court through the vehicle of Section 2281. While it may be true that the

Plaintiffs in the principal suit initially sought a constitutional attack on a statute affecting only one school district, the gravamen of the litigation was changed by the Order of June 14, 1972 of the Trial Court. The necessity of a three judge panel cannot be waived by the parties. *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U.S. 10, 75 Law Ed, 135 (1930). The Trial Court should have moved on its own to impanel a tri-judge court; its failure to do so constitutes a fatal jurisdictional defect. Notwithstanding the compelling arguments for impanelling a three judge panel, the Court of Appeals for the Sixth Circuit dismissed the Petition of the Petitioning School Districts for issuance of a Writ of Prohibition and Mandamus which was predicated, in part, upon this ground. (Reference, Appendix C) Since we were not favored with an opinion by the Circuit Court of Appeals as to the reason for the dismissal of the Petition for Writ of Prohibition and Mandamus, the Petitioners are unable to ascertain the basis for such denial. It is respectfully suggested, however, that the failure of the Court of Appeals for the Sixth Circuit to issue the Writ of Prohibition and Mandamus is wholly in error and contrary to the requirements of Section 2281 and, hence, there is a jurisdictionally fatal defect in the proceedings in the Trial Court.

CONCLUSION

Petitioners desire to advise the Court that the principal case of *Bradley et al* v. *Milliken et al*, has been appealed to the United States Court of Appeals for the Sixth Circuit and bears Docket No. 72-8002. Oral arguments were held in the principal litigation on August 24, 1972. At that time, the appellate court announced that the matter would be taken under advisement. No decision has been reached by the appellate court to the date of this writing.

The Petitioners are not parties litigant to that appeal. They did not intervene in the lower court or in the appellate court in the principal litigation. However, in order to protect the rights of the

Petitioners, as the result of the dismissal of the Petition for Writ of Prohibition and Mandamus by the Court of Appeals, it is necessary that a Writ of Certiorari should be granted by this Honorable Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs v. WILLIAM G. MILLIKEN, et al., Defendants and DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor and DENISE MAGDOWSKI, et al., Defendants-Intervenor ET AL.	CIVIL ACTION No. 35257

RULING ON DESEGREGATION AREA
AND
ORDER FOR DEVELOPMENT OF PLAN OF DESEGREGATION

On September 27, 1971 the court made its Ruling on Issue of Segregation, holding that illegal segregation exists in the public schools of the City of Detroit as a result of a course of conduct on the part of the State of Michigan and the Detroit Board of Education. Having found a constitutional violation as established, on October 4, 1971 the court directed the school board defendants, City and State, to develop and submit plans of desegregation, designed to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. The directive called for the submission of both a

"Detroit-only" and a "Metropolitan" plan.

Plans for the desegregation of the Detroit schools were submitted by the Detroit Board of Education and by the plaintiffs. Following five days of hearings the court found that while plaintiffs' plan would accomplish more desegregation than now obtains in the system, or which would be achieved under either Plan A or C of the Detroit Board of Education submissions, none of the plans would result in the desegregation of the public schools of the Detroit school district. The court, in its findings of fact and conclusions of law, concluded that "relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city," and that it had the authority and the duty to look beyond such limits for a solution to the illegal segregation in the Detroit public schools. Accordingly, the court ruled, it had to consider a metropolitan remedy for segregation.

The parties submitted a number of plans for metropolitan desegregation. The State Board of Education submitted six - without recommendation, and without indicating any preference. With the exception of one of these, none could be considered as designed to accomplish desegregation. On the other hand the proposals of intervening defendant Magdowski, et al., the Detroit Board of Education and the plaintiffs were all good faith efforts to accomplish desegregation in the Detroit metropolitan area. The three plans submitted by these parties have many similarities, and all of them propose to incorporate, geographically, most–and in one instance, all–of the three-county area of Wayne, Oakland and Macomb.

The hearing on the proposals have set the framework, and have articulated the criteria and considerations, for developing and evaluating an effective plan of metropolitan desegregation. None of the submissions represent a complete plan for the effective and equitable desegregation of the metropolitan area, capable of implementation in its present form. The court will therefore draw upon the resources of the parties to devise, pursuant to its direction, a constitutional plan of desegregation of the Detroit public schools.

Based on the entire record herein, the previous oral and written rulings and orders of this court, and the Findings of Fact and Conclusions of Law filed herewith, IT IS ORDERED:

I.

A. As a panel charged with the responsibility of preparing and submitting an effective desegretation plan in accordance with the provisions of this order, the court appoints the following:

1. A designee of the State Superintendent of Public Instruction;*

2. Harold Wagner, Supervisor of the Transportation Unit in the Safety and Traffic Education Program of the State Department of Education;

3. Merle Henrickson, Detroit Board of Education;

4. Aubrey McCutcheon, Detroit Board of Education;

5. Freeman Flynn, Detroit Board of Education;

6. Gordon Foster, expert for plaintiffs;

7. Richard Morshead, representing defendant Magdowski, et al.;

8. A designee of the newly intervening defendants;*

9. Rita Scott, of the Michigan Civil Rights Commission.

Should any designated member of this panel be unable to serve, the other members of the panel shall elect any necessary replacements, upon notice to the court and the parties. In the absence of objections within five days of the notice, and pending a final ruling, such designated replacement shall act as a member of the panel.

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*The designees of the State Superintendent of Public Instruction and newly intervening defendants shall be communicated to the court within seven days of the entry of this order. In the event the newly intervening defendants cannot agree upon a designee, they may each submit a nominee within seven days from the entry of this order, and the court shall select one of the nominees as representative of said defendants.

B. As soon as possible, but in no event later than 45 days after the issuance of this order, the panel is to develop a plan for the assignment of pupils as set forth below in order to provide the maximum actual desegregation, and shall develop as well a plan for the transportation of pupils, for implementation for all grades, schools and clusters in the desegregation area. Insofar as required by the circumstances, which are to be detailed in particular, the panel may recommend immediate implementation of an interim desegregation plan for grades K-6, K-8 or K-9 in all or in as many clusters as practicable, with complete and final desegregation to proceed in no event later than the fall 1973 term. In its transportation plan the panel shall, to meet the needs of the proposed pupil assignment plan, make recommendations, including the shortest possible time table, for acquiring sufficient additional transportation facilities for any interim or final plan of desegregation. Such recommendations shall be filed forthwith and in no event later than 45 days after the entry of this order. Should it develop that some additional transportation equipment is needed for an interim plan, the panel shall make recommendations for such acquisition within 20 days of this order.

C. The parties, their agents, employees, successors and all others having actual notice of this order shall cooperate fully with the panel in their assigned mission, including, but not limited to, the provision of data and reasonable full and part-time staff assistance as requested by the panel. The State defendants shall provide support, accreditation, funds, and otherwise take all actions necessary to insure that local officials and employees cooperate fully with the panel. All reasonable costs incurred by the panel shall be borne by the State defendants; provided, however, that staff assistance or other services provided by any school district, its employees or agents, shall be without charge, and the cost thereof shall be borne by such school district.

II.

A. Pupil reassignment to accomplish desegretation of the Detroit public schools is required within the geographical area which may be described as encompassing the following school districts (see Exhibit P.M. 12), and hereinafter referred to as the "desegregation area":

Lakeshore
Lakeview
Roseville
South Lake
East Detroit
Grosse Pointe
Centerline
Fitzgerald
Van Dyke
Fraser
Harper Woods
Warren
Warren Woods
Clawson
Hamtramck
Lamphere
Madison Heights
Troy
Birmingham
Hazel Park
Highland Park
Royal Oak
Berkley
Ferndale
Southfield
Bloomfield Hills
Oak Park
Redford Union
West Bloomfield
Clarenceville
Farmington
Livonia
South Redford
Crestwood
Dearborn
Dearborn Heights
Fairlane
Garden City
North Dearborn Heights
Cherry Hill
Inkster
Wayne
Westwood
Ecorse
Romulus
Taylor
River Rouge
Riverview
Wyandotte
Allen Park
Lincoln Park
Melvindale
Southgate
Detroit

Provided, however, that if in the actual assignment of pupils it appears necessary and feasible to achieve effective and complete racial desegregation to reassign pupils of another district or other districts, the desegregation panel may, upon notice to the parties, apply to the Court for an appropriate modification of this order.

B. Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom be substantially disproportionate to the overall pupil racial composition. The panel may, upon notice to the parties, recommend reorganization of clusters within the desegregation area in order to minimize administrative inconvenience, or time and/or numbers of pupils requiring transportation.

C. Appropriate and safe transportation arrangements shall be made available without cost to all pupils assigned to schools deemed by the panel to be other than "walk-in" schools.

D. Consistent with the requirements of maximum actual desegregation, every effort should be made to minimize the numbers of pupils to be reassigned and requiring transportation, the time pupils spend in transit, and the number and cost of new transportation facilities to be acquired by utilizing such techniques as clustering, the "skip" technique, island zoning, reasonable

staggering of school hours, and maximization of use of existing transportation facilities, including buses owned or leased by school districts and buses operated by public transit authorities and private charter companies. The panel shall develop appropriate recommendations for limiting transfers which affect the desegregation of particular schools.

E. Transportation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels. In the determination of the utilization of existing, and the construction of new, facilities, care shall be taken to randomize the location of particular grade levels.

F. Faculty and staff shall be reassigned, in keeping with pupil desegregation, so as to prevent the creation or continuation of the identification of schools by reference to past racial composition, or the continuation of substantially disproportionate racial composition of the faculty and staffs, of the schools in the desegregation area. The faculty and staffs assigned to the schools within the desegregation area shall be substantially desegregated, bearing in mind, however, that the desideratum is the balance of faculty and staff by qualifications for subject and grade level, and then by race, experience and sex. In the context of the evidence in this case, it is appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team.

G. In the hiring, assignment, promotion, demotion, and dismissal of faculty and staff, racially non-discriminatory criteria must be developed and used; provided, however, there shall be no reduction in efforts to increase minority group representation among faculty and staff in the desegregation area. Affirmative action shall be taken to increase minority employment in all levels of teaching and administration.

H. The restructuring of school facility utilization necessitated by pupil reassignments should produce schools of substantially like quality, facilties, extra-curricular activities and staffs; and the

utilization of existing school capacity through the desegregation area shall be made on the basis of uniform criteria.

I. The State Board of Education and the State Superintendent of Education shall with respect to all school construction and expansion, "consider the factor of racial balance along with other educational considerations in making decisions about new school sites, expansion of present facilties * * *"; and shall, within the desegregation area disapprove all proposals for new construction or expansion of existing facilities when "housing patterns in an area would result in a school largely segregated on racial * * * lines," all in accordance with the 1966 directive issued by the State Board of Education to local school boards and the State Board's "School Plant Planning Handbook" (see Ruling on Issue of segregation, p. 13.).

J. Pending further orders of the court, existing school district and regional boundaries and school governance arrangements will be maintained and continued, except to the extent necessary to effect pupil and faculty desegregation as set forth herein; provided, however, that existing administrative, financial, contractual, property and governance arrangements shall be examined, and recommendations for their temporary and permanent retention or modification shall be made, in light of the need to operate an effectively desegregated system of schools.

K. At each school within the desegregated area provision shall be made to insure that the cirriculum, activities, and conduct standards respect the diversity of students from differing ethnic backgrounds and the dignity and safety of each individual, students, faculty, staff and parents.

L. The defendants shall, to insure the effective desegregation of the schools in the desegregation area, take immediate action including, but not limited to, the establishment or expansion of in-service training of faculty and staff, create bi-racial committees, employ black counselors, and require bi-racial and non-discriminatory extra-curricular activities.

III.

The State Superintendent of Public Instruction, with the

assistance of the other state defendants, shall examine, and make recommendations, consistent with the principles established above, for appropriate interim and final arrangements for the (1) financial, (2) administrative and school governance, and (3) contractual arrangements for the operation of the schools within the desegregation area, including steps for unifying, or otherwise making uniform the personnel policies, procedures, contracts, and property arrangements of the various school districts.

Within 15 days of the entry of this order, the Superintendent shall advise the court and the parties of his progress in preparing such recommendations by filing a written report with the court and serving it on the parties. In not later than 45 days after the entry of this order, the Superintendent shall file with the court his recommendations for appropriate interim and final relief in these respects.

In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court, may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary. In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation.

IV.

Each party may file appropriate plans or proposals for inclusion in any final order which may issue in this cause. The intent of this order is to permit all the parties to proceed apace with the task before us: fashioning an effective plan for the desegregation of the Detroit public schools.

Fifteen days after the filing of the reports required herein, hearings will begin on any proposal to modify any interim plan prepared by the panel and all other matters which may be incident to the adoption and implementation of any interim plan of desegregation submitted. The parties are placed on notice that they are to be prepared at that time to present their objections,

alternatives and modifications. At such hearing the court will not consider objections to desegregation or proposals offered "instead" of desegregation.

Hearings on a final plan of desegregation will be set as circumstances require.

DATE: JUNE 14, 1972.

/s/ Stephen J. Roth
United States District Judge

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS
FOR THE 6th CIRCUIT

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN and CLARENCEVILLE SCHOOL DISTRICT OF OAKLAND AND WAYNE COUNTIES, MICHIGAN, **Petitioners,** **-vs-** **THE HONORABLE STEPHEN J. ROTH, District Judge for the Eastern District of Michigan, Southern Division,** **Respondent.**	**Docket No.**

PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE 6th CIRCUIT

NOW COMES WEST BLOOMFIELD SCHOOL DISTRICT of Oakland County, Michigan, and CLARENCEVILLE SCHOOL DISTRICT of Oakland and Wayne Counties, Michigan, by their attorneys, Dell, Shantz, Booker and Schulte, and in this their Petition for issuance of a Writ of Prohibition and Mandamus, do respectfully show unto this Honorable Court as follows:

I JURISDICTIONAL STATEMENT

1. The Petitioner, WEST BLOOMFIELD SCHOOL DISTRICT, is a School District of the Third Class, organized under the laws of the State of Michigan, more particularly, Act 269 of Public Acts of 1955, as amended, MSA 15.3001, et seq. Geographically, WEST BLOOMFIELD SCHOOL DISTRICT is located North and West of the City of Detroit, Michigan.

2. The Petitioner CLARENCEVILLE SCHOOL DISTRICT is a School District of the Third Class organized under the laws of the State of Michigan, more particularly, Act 269 of Public Acts of 1955 as amended, MCLA 340.1, et seq, and MSA 15.3001, et seq. Geographically, CLARENCEVILLE SCHOOL DISTRICT is located to the West of the City of Detroit, and is located in part in Oakland County and in part in Wayne County.

3. Jurisdiction of the Court of Appeals is invoked under Section 1651 of Title 28 of the United States Code and Rule 21 of the Federal Rules of Appellate Procedure. The relief sought is not available in any other manner in that the Petitioners are not a party to the litigation hereinafter more completely identified in Exhibit A annexed hereto, and for brevity, generally referred to as *Ronald Bradley, et al* -vs- *William Milliken, et al*, being civil action No. 35257 in the United States District Court for the Eastern District of Michigan, Southern Division.

The alternative available to the Petitioners to contest the propriety of the rulings and judgment of the Trial Court is refusal to obey the Orders of the Court, which refusal would carry with it the threat of punishment by contempt. It is respectfully submitted that this provides no real alternative to conscientious and thoughtful members of the Board of Education and staff of the respective Petitioning School Districts and that there is in reality, only one remedy available, and that this Petition for Writ of Prohibition and Mandamus is such remedy.

II RULINGS AND ORDERS OF TRIAL COURT BELOW AND OTHER EXHIBITS

Attached hereto and by reference incorporated herein are the Rulings and Orders of the Honorable Stephen J. Roth, District Judge in the case of *Ronald Bradley, et al* -vs- *William Milliken, et al*, Civil Action No. 35257, United States District Court, Eastern District of Michigan, Southern Division, and other pertinent Exhibits all of which are more specifically identified as follows:

Exhibit A - Full entitlement of said cause.

Exhibit B - Ruling on issue of segregation by Trial Court, September 27, 1971.

Exhibit C - Findings and conclusions of law on Detroit. Only plans of de-segregation of Trial Court, March 28, 1972.

Exhibit D - Findings of fact and conclusions of law in support of ruling on de-segregation area and development of plan by Trial Court June 14, 1972.

Exhibit E - Ruling on de-segregation area and Order for development of plan of de-segregation of Trial Court, June 14, 1972.

Exhibit F - Copy of Plaintiffs' Complaint.

Exhibit G - Affidavit of Assistant Superintendent of West Bloomfield School District.

Exhibit H - Affidavit of Superintendent of Clarenceville School District.

Exhibit I - Excerpts from Transcript of proceedings on April 13, 1972 before Trial Court (uncertified).

Exhibit J - Plaintiffs' Exhibit PM-12 (identifying school district "clusters").

Exhibit K - Map of area including identification of petitioning school districts.

III QUESTIONS OF LAW PRESENTED

A brief review of Exhibits A through F, inclusive, will demonstrate that the Petitioners were neither a party-Plaintiff nor Defendant to the litigation in the Trial Court below, and did not seek to intervene therein. Neither Petitioning School District was served with process nor was either School District joined as a party to said proceedings in any manner. Notwithstanding these basic jurisdictional defects, both petitioning School Districts were included as one of the fifty-two (52) School Districts included in the de-segregation area described in the Order of June 14, 1972[1]. These

[1] Although 53 districts are included in the Ruling and Order, Exhibit E, two of the Districts, Dearborn and Fairlane merged.

circumstances, and the statement of facts and law hereinafter set forth, give rise to four legal questions which may be briefly stated as follows:

A. DOES A FEDERAL DISTRICT COURT HAVE JURISDICTION TO INCLUDE A SCHOOL DISTRICT OF THE STATE OF MICHIGAN IN A DE-SEGREGATION ORDER OF SAID COURT WHERE SAID SCHOOL DISTRICT HAS NOT BEEN SERVED WITH PROCESS FROM SAID COURT; IS NOT A PARTY TO SAID SUIT; AND HAS NOT INTERVENED THEREIN?

B. WHERE A FEDERAL DISTRICT COURT'S FINDING OF *DE JURE* SEGREGATION IS LIMITED TO POLICIES AND PRACTICES SOLELY WITHIN THE CITY OF DETROIT SCHOOL DISTRICT, DOES SAID COURT HAVE JURISDICTION TO EXTEND THE REMEDY FOR SUCH FINDING TO INCLUDE A SCHOOL DISTRICT WHICH IS NOT NOW, NOR HAS IT BEEN IN THE PAST, A PART OF SAID CITY OF DETROIT SCHOOL DISTRICT, WHERE SAID PETITIONING SCHOOL DISTRICT IS NOT A PARTY TO, NOR INTERVENOR IN, THE LITIGATION BEFORE THE TRIAL COURT BELOW?

It should be noted that the State of Michigan is not a party to the litigation in the Trial Court. The absence of the State of Michigan as a party, it not having consented to be sued, suggests yet another jurisdictional question:

C. DOES THE FEDERAL DISTRICT COURT HAVE THE JURISDICTION TO ORDER AN AGENCY OF THE STATE OF MICHIGAN TO COMPLY WITH THE ORDERS OF SAID COURT, WHERE NEITHER THE STATE OF MICHIGAN, NOR SAID AGENCY OF THE STATE, ARE PARTIES TO, NOR INTERVENORS IN, THE LITIGATION FROM WHICH SAID ORDER FLOWS?

The Petitioners believe that the answer to each question posed above must be in the negative.

Separate from, but nonetheless interwoven with the questions above, is yet another basic question of jurisprudence suggested by

the direct constitutional challenge to the Constitution and Statues of the State of Michigan expressed and inherent in the Court's rulings. This challenge causes the Petitioners to propose an additional question which is likewise jurisdictional in nature:

D. WHERE A FEDERAL DISTRICT JUDGE SEEKS TO IMPOSE EQUITABLE RELIEF IN A DE-SEGREGATION SUIT, WHICH BY THE TERMS OF SUCH RELIEF, CHALLENGES THE CONSTITUTIONALITY OF THE CONSTITUTION AND STATUTES OF THE STATE OF MICHIGAN AND ENJOINS THE OPERATION OF SUCH STATUTES IN SOME FIFTY-TWO (52) SCHOOL DISTRICTS, DOES THE FAILURE OF THE TRIAL COURT TO CONVENE A THREE (3) JUDGE PANEL UNDER 28 U.S.C. 2281 DEPRIVE THE TRIAL COURT OF JURISDICTION AND VOID ITS ORDERS WITH RESPECT THERETO?

The Petitioners believe that this question must be answered in the affirmative.

It would appear that the Trial Court conceives the answer to all such jurisdictional questions to be otherwise than as indicated by the Petitioners. Your Petitioners respectfully suggest, however, that the Trial Court's references to these crucial and basic jurisdictional questions is both cursory and erroneous[2]

IV CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The provisions of the Constitution of the United States at issue herein are as follows:

ARTICLE III

SECTION 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of

[2] Reference Exhibit D, ¶11, page 36.

the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The provisions of the Constitution of the State of Michigan at issue are as follows:

ARTICLE VIII

SECTION 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

3. The Statutes of the United States in issue are:

28 United States Code 1343

The district courts shall have original jurisdiction of any civil

action authorized by law to be commenced by any person:

. . . . . ;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 United States Code 2281

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

4. The Statutes of the State of Michigan at issue are as follows:

Act 269 of Public Acts of Michigan of 1955, as amended (MCLA 340.1, et seq) specifically including the following sections:

a. Preamble:

"AN ACT to provide a system of public instruction and primary schools; to provide for the classification, organization, regulation and maintenance of schools and school districts; to prescribe their rights, powers, duties and privileges; to provide for registration of school districts, and to prescribe powers and duties with respect thereto; to provide for and prescribe the powers and duties of certain boards and officials; to prescribe penalties; and to repeal certain acts and

parts of acts."

b. Chapter 1, Section 2, MCLA 340.2:

"Hereafter, except as otherwise provided in this act, each and every school district shall be organized and conducted as:

1. A primary school district; or
2. A school district of the fourth class; or
3. A school district of the third class; or
4. A school district of the second class; or
5. A school district of the first class."

c. Section 352 (MCLA 340.352, MSA 15.3352)

"Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gift, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district shall be the successor of any school district previously existing within the same territorial limits and shall be vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years; and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law."

V. STATEMENT OF CASE

On August 18, 1970, Plaintiffs brought suit alleging violation of Constitutional rights and seeking a declaration that Act 48 of Public Acts of 1970 be declared unconstitutional [3] and requesting additional injunctive relief. [4]

The Trial Court, in its "Ruling on Issue of Segregation" dated September 27, 1971, found that the Defendant-City of Detroit School District had committed acts, countenanced by the State Defendants, which resulted in *de jure* segregation of the Detroit Schools. No finding of the Court, attached hereto as Exhibit B and C suggests that the failure to maintain a unitary system in the Detroit Public Schools was caused by, or attributable to, the creation of the petitioning school districts or any other such independent school district in the so-called metropolitan area including other school districts located in the County of Wayne, County of Oakland and County of Macomb, excepting the Detroit district. Such acts upon which the Trial Court purports to predicate his findings, relates solely to policies or practices confined to the Detroit School District. Notwithstanding these limitations of its own findings, the Trial Court on March 28, 1972 announced that a "Metropolitan Plan" would be required to accomplish de-segregation of the Detroit School District, relying in the main upon the recently reversed District Court decision in *Bradley* -vs- *School Board of the City of Richmond*, 338 F Supp 67 (E.D. VA. 1972) reversed by the 4th Circuit Court of Appeals in F 2d , June 5, 1972, 40 LW 2813. Thereafter, on June 14, 1972, the Trial Court, after further testimony and evidence, entered its Order identifying the "de-segregation area" to be encompassed by the Metropolital Plan. The petitioning school districts were included in the "de-segregation area" along with some fifty-two (52) other school districts all outside the limits of the Detroit School District which district boundaries are coterminus with the boundaries of the City of Detroit. [5] The Petitioning School Districts were not parties to the litigation and did not intervene therein. [6] Nonetheless, the petitioning School Districts were included in the

[3] Reference ¶I of Plaintiff's Complaint, Exhibit F.

[4] Reference Plaintiff's Complaint, page 12, etc., Exhibit F.

[5] Reference Exhibit E, ¶II, A, page 5.

[6] Reference Exhibit A.

de-segregation area and ordered to "cooperate fully" with the panel of persons selected by the Court and charged with the responsibility of developing the details of the de-segregation plan within the framework delineated by the Trial Court in its Order of June 14, 1972, which Order includes the following provision:

"C. The parties, their agents, employees, successors, and all others having actual notice of this order shall cooperate fully with the panel in their assigned mission, including, but not limited to, the provision of data and reasonable full and part-time staff assistance as requested by the panel. The State defendants shall provide support, accreditation, funds, and otherwise take all actions necessary to insure that local officials and employees cooperate fully with the panel. All reasonable costs incurred by the panel shall be borne by the State defendants; provided, however, that staff assistance or other services provided by any school district, its employees or agents, shall be without charge, and the cost thereof shall be borne by such school district." [7]

It is contended by the Petitioners that the inclusion of these school districts in said "desegregation order" without trial on the merits of the alleged constitutional violations is wholly erroneous and that it constitutes the reckless attempt by the District Court to extend the power of the judiciary and represents an unprecedented, direct challenge to the sovereign power of the State of Michigan. It likewise represents the total abandonment of all concepts of jurisdiction, notice, due process, and the right to an adjudication on the merits.

VI ARGUMENT

There can be no question that School Districts of the State of Michigan are municipal corporations. *Marathon School District No. 4* -vs- *Gage*, 39 Mich. 484 (1878); or at the very least a quasi-municipal corporation. *King* -vs- *School District No. 5*, 261 Mich. 605 (1933). School Districts are State agencies deriving their power and authority from the Constitution of the State and legislature. *Public Schools of Battle Creek* -vs- *Kennedy*, 245 Mich 585 (1929) and *Board of Education of Detroit* -vs- *Superintendent of Public Instruction*, 319 Mich 436 (1947). Each school district

[7] Reference Exhibit E, ¶I, C.

has the power to "sue and be sued in its name". [8]

The State of Michigan is not a party to this litigation. The so-called State defendants, i.e. the Governor and Attorney General, and Superintendent of Public Instruction, have no plenary powers as to this Respondent under the Michigan Constitution. [9] The State Board of Education has "leadership and general supervision over all public education" [10], and serves as a "general planning and coordinating body for all public education" [10].

None of the State Defendants has the power to create or alter the boundaries of school districts. *School District of the City of Lansing -vs- Michigan State Board of Education*, 367 Mich 591 (1962). Nor do the State Defendants have the authority to require local districts to admit non-resident pupils to the District. That authority is vested in the legislature which has provided specific statutory authority and control of such transfers to be vested in the local school district. [11] This provision was confirmed in *Jones vs- Grand Ledge Public Schools, 349 Mich 1 (1957).*

> "We are in accord with the finding of the trial judge that under the present school code the defendant school district is not charged with the duty of accepting nonresident pupils. The language of the statute must be construed as it reads. It is not within the province of this Court to read therein a mandate that the legislature has not seen fit to incorporate. Our duty is to apply the law as we find it...."
>
> *Jones, supra, page 11*

The constitutional character of school districts has been recognized in *Detroit Board of Education -vs- Superintendent of Public Instruction*, 319 Mich 436 (1947). There the Supreme Court of Michigan found unconstitutional (under the Michigan Constitution of 1908) an attempt by the State legislature to create a statewide school district to share in sales tax revenues then provided by provision of the 1908 Constitution. The Court held:

[8] §352, Public Act 269 of Public Acts of 1955, MCL 1948, §340.352 MSA 15.3352.

[9] Reference Article V, Michigan Constitution, §1-29.

[10] Reference Article VIII, Michigan Constitution, §3.

[11] Reference §582, Act 269 of Public Acts of 1955; MCL 1948, §340.582, MSA 15.3582.

"We hold that the State school district sought to be created by this Act is not a 'school district' within the meaning of the term as used in Article X, Section 23 of the Constitution."

Detroit Board of Ed., supra, page 451

The petitioner suggests that Section 2 of Article VIII of the present Michigan Constitution reinforces the constitutional character of local school districts in Michigan. That Section provides as follows:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin."

Having thus identified the constitutional nature of Michigan school districts, and having demonstrated that these constitutional entities are entitled to due process, let us turn to the treatment of these school districts by the Trial Court as witnessed in its findings of fact and ruling on de-segregation area and order for development of plan of de-segregation [12].

The Trial Court apparently conceives that *Hunter* -vs- *City of Pittsburgh*, 207 U.S. 161 (1907), cited by the Trial Court in paragraph 11 of Exhibit E and in footnote 22 to that Exhibit, clothes the Trial Court with judicial precedent for sweeping jurisdictional and due process requirements under some convenient judicial rug. Since the Trial Court relied upon it so heavily (having referred to *Hunter*, supra, in open Court) [13], we deem it appropriate to direct the Court of Appeal's attention to the decision.

The Trial Court's interpretation of *Hunter*, supra, is untenable. *Hunter*, supra, involves the consolidation of the City of Allegheny and the City of Pittsburgh, Pennsylvania. Plaintiff-residents of the City of Allegheny objected to the consolidation and to the entry of a decree confirming the consolidation which had been taken in conformity with a Statute of the General Assembly of Pennsylvania. The Plaintiffs claimed the action deprived them of federally guaranteed rights. In denying this argument, the Supreme

[12] Reference Exhibits D and E.

[13] Reference Exhibit I, Excerpt from proceedings, April 13, 1972.

Court held:

"....Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. *The state, therefore, at its pleasure, may modify or withdraw all such powers,* may take without compensation such property, hold it itself, or vest in it other agencies, *expand or contract the territorial area, unite the whole or a part* of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects *the state is supreme, and its legislative body,* conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

Hunter, supra, 178, 179

Emphasis added

The case clearly stands for the proposition that the State legislature may modify its municipal subdivisions including the boundaries thereof. There is no suggestion in *Hunter* that the

power is likewise conferred on the United States District Court. The Supreme Court's decision in *Hunter* is diametrically opposed to the contorted interpretation which the Trial Court has imposed upon the language of that decision in order to utilize it to ignore the jurisdictional requirements as to this and other school districts. It is interesting to note that in *Bradley, et al* -vs- *School Board of the City of Richmond*, F 2d (CA 4, June 5, 1972) 40 LW 2813, the 4th Circuit, applied *Hunter* in reversing the decision of the District Court.

A further key to the Trial Court's total disregard for the jurisdictional and due process requirements to be afforded to the petitioning school districts is found in the opening paragraph of the Findings of Fact and Conclusions of Law filed on June 14, 1972 [14].

> "....It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation."

This candid statement as to the total lack of proofs in these areas by the Trial Court did not, however, impede the Court from proceeding to include some 52 of 86 tri-county school districts within its Order. The petitioners urge that it is noteworthy, that if the Trial Court had joined the local districts and afforded a hearing on the merits, this evidence would have been before the Court for determination.

Notwithstanding the failure of the Trial Court to take proofs on the boundaries of the 86 school districts, the Trial Court decided that the boundaries of the districts were "artificial" [15]. It is respectfully suggested that the obvious contradiction of the Court's finding and candid admission of the total lack of proofs on the subjects of the boundaries of the suburban school districts, should not go unheeded by this Appellate Court.

[14] Reference Exhibit D, page 1.
[15] Reference Exhibit D, Footnote 7, p. ii.

The Trial Court then proceeds to findings that the 86 school districts are a "relevent school community which can serve as an initial benchmark" [16] for de-segregating the Detroit District. This finding by the Court, is, however, totally unsupported by the evidence before the Court with respect to the de jure segregation which the Court found applicable in the Detroit System Only. Nor does this finding by the Court serve as an excuse for denial of traditional concepts of due process and jurisdiction.

The Trial Court seeks to dismiss the basic requirements for jurisdiction and due process by concluding that the remedial powers available to it are as broad as may be required to effect the social reform which the Trial Court deems desirable [17].

In its ruling, the Trial Court cites some 12 cases which purportedly sustain the position that "all steps necessary and essential" to protect the constitutional rights of the Plaintiffs may be utilized to tramel the constitutional rights of due process and jurisdiction of the petitioners. [17] None of the cases cited by the Trial Court, including *Hunter*, supra, already discussed in detail, suggest the precedent which the Trial Court would wrench from the citations. The Trial Court cites *Swann* -vs- *Charlotte-Mechlenburg Board of Education*, 402 U.S. 1,91 S.Ct. 1267 (1971). But in so citing the *Swann* decision, the Trial Court clearly ignores the judicial admonition of *Swann*.

> "... *However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.* The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
>
> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary.* Judicial authority enters only when local authority defaults.

[16] Reference Exhibit D, ¶17, p. 8.

[17] Reference Exhibit D, ¶11, p. 36.

"[4] School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.* As with any equity case, the nature of the violation determines the scope of the remedy."

Swann, supra, page 16, Emphasis added

The Trial Court likewise chose to ignore the precedents of the 6th Circuit in this same case. In *Bradley* -vs- *Milliken*, 438 F. 2d, 945, 946-947, this Court held:

"The issue in this case is not what might be a desirable Detroit school plan, but whether or not there are constitutional violations in the school system as presently operated, and, if so, what relief is necessary to avoid further impairment of constitutional rights. *There must be a trial on the merits as to the alleged constitutional violations as a predicate to relief in the federal courts.* On the present appeal a second effort is made to persuade this court to grant summary relief. The trouble with this procedure is that there has never been an evidentiary hearing on the charges set forth in the complaint nor any findings of fact with respect to these charges."

Bradley, supra, Emphasis added

The Trial Court could well have had before it the proofs of the establishment of the school districts had it chosen to do so. Having elected not to afford the petitioning school districts their day in Court, the Trial Court cannot now fashion a remedy as if the petitioners did not exist. Nor may it treat the petitioners as if they had been a party to this litigation any more than the Trial Court could have reached out to a school district in the City of Toledo, Ohio, in order to fashion a "remedy".

The Affidavits on behalf of the petitioning school districts,

attached hereto as Exhibits G and H, respectively, demonstrate that these petitioning school districts came into existence long before *Brown -vs- Board of Education*, 349 U.S. 294 (1955). The Trial Court could have well considered the language of *Spencer -vs- Kugler*, 326 F. Supp. 1235, 1242 (NJ, 1971), affirmed in 92 S. Ct. 707 (1972), wherein it was stated:

> "... The creation of these school districts by approval of the legislature on September 18, 1953, preceded the historic decision of *Brown I*, decided on May 17, 1954. The obvious intent of the legislature was to maintain a unitary school system as *Brown I* later required. While the result of such legislation some 18 years later may be racial imbalance, within certain school districts, it does not amount to segregation."
>
> *Spencer, supra, pages 1242 and 1243*

Suffice it to say, the Trial Court's findings are limited to the School District of the City of Detroit and there is no basis for spreading the remedy beyond that School District.

The right to be heard is basic to our system of jurisprudence. The right to notice, the due process, and to proper hearing and to an appropriate hearing before a fair and impartial judiciary should require no citation. Nonetheless, the total absence of these qualities in the Trial Court leads one to conclude that from time to time, it is necessary to remind all of us who practice before the Courts and render the judgments of the Court, that these fundamentals cannot be ignored no matter how appealing the claim of the plaintiffs nor compelling the necessity for bringing litigation to a close.

> "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter."
>
> *Hovey -vs- Elliott 167 U.S. 409, 17 S. Ct. 841 (1897)*

It likewise is of interest to note that the Trial Court, by reference to the case of *Workman* -vs- *Board of Education of Detroit*, 18 Mich. 399, 412 (1869), would have known that the boundaries of the School District of the City of Detroit have been coterminous with the city limits of Detroit since 1867. The Statute, cited in that case, provided that the "City of Detroit shall be considered one school district". That same case, decided unequivocally, that the right to attend schools "shall be possessed equally and impartially by all residents". The judicial precedent of the State of Michigan precedes *Brown I* by almost 100 years. *Workman, supra*, clearly identified the right of any resident of the City of Detroit, black, white, or otherwise, to attend schools within that district. The Constitution of Michigan, in Article VIII, Section 2, referred to above, unequivocally reinforces that judicial precedent.

It cannot be overemphasized that there is not an iota of evidence before the Trial Court that the School District boundaries to which the Trial Court pays so little heed, were drawn for any invidious purpose or that any student of any district outside of the City of Detroit, was denied admission to such schools within his district of residence because of race, color or creed. As this Circuit held in *Deal* -vs- *Cincinnati Board of Education*, 419 F. 2d, 1387, 1390-1391 (1969):

> "On the other hand, our case involves the operation of a long-established unitary non-racial school system—just schools where Negro as well as white children may attend in the district of their residence. There is not *an iota* of evidence in this record where any of the plaintiffs or any of the class which they represent, was denied admission to a school in the district of his residence.
>
> "[2] It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend

school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races."

and further;

"Appellants contend that housing patterns in Cincinnati are segregated as a result of actions of both public and private agencies and that the School Board 'may not close its eyes to this reality' but should remedy it. We are not told how or by what lawful authority the School Board can remedy the housing patterns of a neighborhood. Perhaps what appellants want is for the Court to order the Board to provide buses to transport children to other districts where they do not reside, construct additional schools in such other districts where necessary to accomplish this purpose, and abandon the existing neighborhood schools. We find no basis to enter any such order."

Deal, supra, page 1391

The Trial Court has greviously exceeded its statutory authority in imposing a remedy which involves school districts which were not parties to the litigation; did not intervene, as to which districts, the Trial Court admits, there is not a scintilla of evidence of the commission of any act of de jure segregation. [18]

The only basis for the Court's ruling to include other school districts, including the petitioners, is spelled out in pages 1485, 1486, 1487 and 1488 of Exhibit 1. Bereft of citations, the Court equates voluntary and statutory collective action by municipalities as a predicate for relief to be judicially imposed in this case without jurisdiction, without notice and without due process as to these petitioners.

Pure and simple, the Court's relief is based upon a subjective determination that additional racial mix is needed to de-segregate the Detroit School District. This attitude, expressed by the Court in its orders and rulings is a judicial attempt to create racial balance within the Detroit District, and regardless of the name by which it may be identified by the Trial Court, this procedure is scored in

[18] Reference Exhibit D, p. 1.

Swann, supra, in which the Supreme Court stated:

"... If we were to read the holding of the District Court to require, as a matter of constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." (at page 24)

A fair reading of the Trial Court's rulings demonstrate that it had decided that there is not sufficient "mix" within the City of Detroit to provide "relief of segregation" [19]. Therefore, the Court reasons that the remedy is as broad as may be necessary to satisfy its self-created standard of racial balance within the Detroit District. The Trial Court then proceeds to ignore the niceties and necessities of jurisdiction, notice and due process and with judicial grease pencil in hand draws a "de-segregation area". That "area" is drawn to provide the magical, judicial balance required to satisfy the erroneous premise that de-segregation equals racial balance. The Trial Court conceives itself limited only by "time of travel" in determining this area.[20] It is respectfully suggested that this is not the law.

* * *

Let us now turn to the requirement of the impaneling of a three-judge Court pursuant to 28 U.S.C. 2881, cited above.

In the Complaint of the Plaintiff, by which this litigation was initiated, the relief sought included a prayer that Act 48 of the Public Acts of Michigan of 1970 be declared unconstitutional. Insofar as petitioners know, these pleadings have not been specifically amended. Coupled with this challenge to the constitutionality of the Act, was a request for relief seeking an injunction against the Defendants–State Defendants and the Detroit School District–from operating the schools within that District in a manner which resulted in students attending "racially identifiable" public schools. Other extensive equity relief was requested[21]. Act 48, referred to above, applied only to School Districts of the First Class. Only Detroit is such a school district in Michigan. Act 48

[19] Reference Exhibit C, p. 5, ¶5.
[20] Reference Exhibit D, p. 19, ¶5.
[21] Reference, Exhibit F, Plaintiff's Complaint.

was declared unconstitutional by this Court in *Bradley* -vs- *Milliken*, 433 F 2d 897 (1970). A three-judge panel was not convened because the Statute was deemed not to be a Statute of statewide application[22].

Notwithstanding that the initial litigation was confined to the School District of the City of Detroit, the tenor and thrust of the litigation changed markedly on March 28, 1972. On that date, the Trial Court announced that de-segregation could not be accomplished "within the geographical limits of Detroit". Previously, it had directed State Defendants and the Detroit School District to propose a metropolital de-segregation plan. On June 14, 1972, the Court entered its Order for development of a de-segregation plan including, inter alia, requirements for student reassignment, faculty and staff reassignment, restrictions on construction and provisions for recommendations on changes in school district boundaries. Recommendations were required to be made on financing, contractual arrangements, and governances.[23]

The Order directs the State Superintendent of Public Instruction to make recommendations to the Court concerning the foregoing matters and with reference to existing State laws pertaining to the affected school district and directs the Superintendent as follows:

> "In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court, may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, *where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary*. In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation." (Emphasis supplied)

This language of the Order constitutes an open invitation to a state officer to make recommendations to the Trial Court for the

[22] Footnote 2, p. 900, *Bradley* -vs- *Milliken*, supra.
[23] Reference Exhibit E, p. 9, ¶III.

entry of Orders contrary to State laws. This Order constitutes a flagrant abuse of judicial power and more importantly, an unprecedented Federal asault upon the Statutes of the State of Michigan.

While the Court's Order speaks in general terms of financial, school district boundaries, contractual obligations and governance, there can be no question that the following Statutes inter alia, are directly challenged by the Court's Order:

1. Michigan School Code of 1955, being Act 269 of the Public Acts of 1955 as amended, (MCLA 340.1, et seq; MSA 15.3001, et seq), (particularly provisions relating to

   a. attendance in school district of residence (MCLA 340.356, MSA 15.3356)

   b. hiring of teachers and staff (MCLA 340.569, MSA 15.3569)

   c. acquisition of transportation (MCLA 340.594, MSA 15.3594)

   d. control of attendance of non-resident students (MCLA 340.582, MSA 15.3582)

   e. determination of appropriate curriculum (MCLA 340.583, MSA 15.3583)

   f. levy of authorized millage (MCLA 340.643 (a), MSA 15.3643 (1), MCLA 340.615, MSA 15.3615)

2. Tenure for Teachers' Act, Act 4 of the Public Acts of 1937 (Ex Sess) MCLA 38.71, MSA 15.1971.

3. Public Employees' Collective Bargaining Statue: Act 336, Public Acts of 1947, as amended, MCLA 423.201, et seq, MSA 17.455 (1), et seq.

These statutes are only a partial list of the Statutes of the State of Michigan the constitutionality of which, is directly challenged by the scope of the Order of June 14, 1972. It is the contention of the petitioners that the Trial Court had no authority to enter

such an Order. It is likewise the contention of the petitioners that a three-judge Court was required to be impaneled by the Trial Court under Section 2281, for a hearing on the merits because the Trial Court, by expanding the scope of the proceedings beyond that framed by the Plaintiffs' Complaint, has brought into the judicial arena a challenge to the constitutionality of the several Statutes cited, and indeed, a challenge to the entire framework of education within the State of Michigan.

The position of the petitioners is sustained by the language of the Statute and the judicial decisions interpreting the provisions. The history of Section 2281 is undoubtedly well known to this Court. Nonetheless, in view of the impact which the case at bar has had upon the community and indeed the nation as a whole, the recitation of that history as noted by the Supreme Court in *Swift and Co.* -vs- *Wickham,* 382 U.S. 111, 86 S. Ct. 258 (1965) is helpful. That opinion details to a considerable degree the legislative history of Section 2281 and its predecessor Statutes.

"The three-judge district court is a unique feature of our jurisprudence, created to alleviate a specific discontent within the federal system. The antecedent of §2281 was a 1910 Act passed to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation regulating railroads and utilities in particular. The federal courts of the early nineteenth century had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes, but such cases were rare and generally of a character that did not offend important state policies. The advent of the Granger and labor movements in the late nineteenth century, and the acceleration of state social legislation especially through the creation of regulatory bodies met with opposition in the federal judiciary. In Chicago, M.& St. P. R. Co. v Minnesota, 134 US 418, 33 L ed 970, 10 S Ct 462, this Court held that the setting of rates not permitting a fair return violated the Due Process Clause of the Fourteenth Amendment. Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441, 13 LRA NS 932, established firmly the corollary that inferior federal courts could enjoin state officials from enforcing such unconstitutional state laws.

"This confrontation between the uncertain contours of the Due Process Clause and developing state regulatory legislation, arising in district courts that were generally considered unsympathetic to the policies of the States, had severe repercussions. Efforts were made in Congress to limit in various ways the jurisdiction of federal courts in these sensitive areas. State officials spoke out against the obstruction and delay occasioned by these federal injunction suits. The sponsor of the bill establishing the three-judge procedure for the cases, Senator Overman of North Carolina, noted:

" '[T]here are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney-general . . .

" 'Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it.' 45 Cong Rec 7256.

"In such an atmosphere was this three-judge court procedure put on the statute books, and although subsequent Congresses have amended the statute its basic structure remains intact.

II

"[6,7] Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 USC § 2284 (2) (1964 ed), thus preventing ex parte injunctions common previously. It provides for three judges, one of whom must be a circuit judge, 28 USC § 2284 (1) (1964 ed), to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. It authorizes direct review by this Court, 28 USC § 1253, as a means of accelerating a final determination on

the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the circuit courts to the Supreme Court, and the consequent disruption of state tax and regulatory programs caused by the outstanding injunction.

"[8,9] That this procedure must be used in any suit for an injunction against state officials on the ground that a state enactment is unconstitutional has been clear from the start. . . . . ."

Swift & Co. -vs- Wickham, pages 199,200,201

Admittedly, the Courts have struggled with the problem of balancing the requirements of the Statute with the drain caused by the assigning of three judges to one case. *Phillips -vs- United States*, 312 U.S. 246, 61 S. Ct. 480 (1941).

However, when the constitutionality of a series of state statutes or the constitution of a state are directly challenged in the Federal Court and where, as here, such challenge is coupled with a request (and Order for) injunctive relief, the necessity of impaneling a three-judge court is not discretionary. It is mandatory. In *Schneider -vs- Rusk*, 372 U.S. 224, 83 S. Ct. 621 (1963), the Supreme Court held:

" . . . . . the constitutional questions involving the deprivation of nationality which were presented to the district judge were plainly not insubstantial. The single-judge District Court was therefore *powerless* to dismiss the action on the merits and should have convened a three-judge court."

Schneider, supra, 225 (Emphasis supplied)

In *Bynum -vs- Connecticut Commission*, 410 F 2d, 173 (1969), the Second Circuit, decided that the Plaintiff's constitutional challenge to the requirement of a payment of a Five Dollar ($5.00) fee as a requisite to restoration of felony conviction suspended voting rights was "not insubstantial". *Bynum*, supra, 176.

Can it be said that the constitutional rights of some 780,000 students (both black and white) and their parents and 52 school districts and the State of Michigan are insubstantial in the light of

the direct constitutional challenge created by the Trial Court's Order? The petitioners insist that the answer must be in the negative and that the three-judge panel was required under Section 2281.

The language of the Trial Court's Order obfuscates the challenge to the State Constitution and Statutes. But, a careful examination of the Order and Ruling of June 14, 1972[24], contrived semantics aside, reveals the Order for what it is; a direct, judicial assault upon the constitutional and statutory structure of the State of Michigan by a single Federal District Judge. If there ever was a case, which meets the "atmosphere" referred to in *Swift*, supra, the present litigation demonstrates the reason for the Statutory requirement.

While initially, it may be true that the Plaintiffs' constitutional attack was limited to Act 48 of Public Acts of 1970, previously referred to, it is equally evident that the Court, *on its own*, has expanded the relief requested to encompass some 52 school districts and to restructure, by constitutional challenge the educational framework of the State of Michigan.

The necessity for a tri-judge panel cannot be waived by the parties. *Stratton -vs- St. Louis Southwestern R Co.*, 282 US 10, 75 Law Ed. 135 (1930). The Court should have moved on its own to impanel a tri-judge court.

We believe that the case of *Florida Lime and Avacado Growers -vs- Jacobsen*, 362 U.S. 73, 80 S. Ct. 568 (1959) provides the precedent by which the Trial Court should have acted on its own.

> "Cases in this Court since Louisville & N. R. Co. v Garrett, 231 US 298, 58 L ed 229, 34 S Ct 48 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has – just as we have on a direct appeal from its action – jurisdiction over *all* claims raised against the statute. These cases represent an unmistakable recognition of the congressional policy to provide

[24] Reference Exhibits D and E.

for a three-judge court *whenever* a state statute is sought to be enjoined on grounds of federal unconstitutionality, and this consideration must be controlling."

Florida Lime and Avocado Growers, supra
Pages 80, 81; Emphasis supplied

The critical language here is the word "*whenever*" a state statute is sought to be enjoined on the basis of Federal unconstitutionality. "Whenever" occurred in the case below, when the Trial Court, on its own, exceeded the scope of the original litigation and brought a direct challenge to the several state statutes referred to above. By its Ruling of March 28th and its Order of June 14th, the Trial Court laid first the predicate, and then created the vehicle for implementation of a plan, which can only be construed as enjoining the operation of the several state statutes on the basis that they conflict with the constitutionality of federal rights purportedly guaranteed to the Plaintiffs. Semantics aside, the import and effect of this single-judge pronouncement is unmistakable and should not be ignored even though the Trial Court has, to the date hereof, chosen to ignore the use of the traditional language in framing what can only be described as a mandatory injunction.

At the time and point where the Trial Court on its own, passed beyond the boundaries of the relief requested by the plaintiffs, it had the duty to impanel a three-judge court to proceed with the trial and its jurisdiction – its power to act – ceased from and after that point. Whether this Appellate Court fixes such time as September 27, 1971, March 28, 1972, or June 14, 1972, is not material. By virtue of its terms, the Order of June 14, 1972 is a nullity and should be quashed. The Statutory requirements for a three-judge court jurisdiction are requirements of substance, not form. *Jehovah's Witnesses* -vs- *King County Hospital*, 278 F Supp. 488 (1967).

Lastly, we would direct the Court's attention to *Brown I* and the companion cases of *Briggs* -vs- *Elliott* and *Davis* -vs- *County Board*, which cases were all direct appeals from three-judge panels (See footnote 1, to *Brown I*, supra, page 347). The history of desegregation cases has been replete with the recognition of the

imperative nature of Section 2881, where state statutes of general application are involved. *North Carolina Board -vs- Swann*, 402 U.S. 43 (1971), is one, but not the last of such cases requiring the impaneling of three judges. If, as the Trial Court contends, the case at bar is merely the progeny of *Brown I*, the jurisdictional requirements applicable to the statutes of Kansas, have no less vitality in the case at bar. Where, as here, the Trial Court on its own motion, thrusts itself into a direct challenge to the State statutes and seeks to enjoin the operation of those statutes within the affected school districts, it must heed the requirements 2281.

This case provides an almost classical example of the "raison d'etat" for Section 2281. One judge, of one district court seeks to dismantle – in the opinion of many – the educational system of the State of Michigan. It is asked "How does one judge get this authority?" The answer to the rhetorical question is that one judge does not have the authority purported to be exercised in the Order of June 14, 1972. A tri-judge panel was required to be convened. Petitioners contend that the Trial Court's failure to invoke Section 2281 is fatal to the Orders of the Trial Court and that the same must be quashed.

VII STATEMENT OF REASONS WRIT OF PROHIBITION AND MANDAMUS SHOULD ISSUE

As previously stated, the petitioners have no right of appeal as they are not parties litigant to this cause. Petitioners trust that they have identified the challenge to the Trial Court's asserted jurisdiction over these petitioners. Issuance of a Writ of Prohibition and Mandamus to direct the Trial Court to vacate said Orders as to these petitioners is the only effective legal remedy available.

The petitioners acknowledge that the issuance of said Writ is an extraordinary remedy. The litigation now before this Court likewise is extraordinary. It involves more students than any prior desegregation yet heard in this country. Its impact will be nationwide; the basic constitutional and jurisdiction questions presented by the petitioners are fundamental to the whole judicial process of this country. The Trial Court had before it a Motion to join all 86

school districts of the tri-county area.[25] It did not do so. Therefore, the school districts have been denied a hearing on both the merits and remedy.

Nor is it dispositive of the rights of these petitioners to say that they could likewise have intervened in this litigation. The circumscribed rights provided to those school districts which did intervene are so limited as to have made intervention a nullity. More importantly, on March 28, 1972, the Trial Court took the first testimony on the metropolitan plan for de-segregation. On that same day, approximately two hours after the intervening school districts had been permitted to appear for the first time in these proceedings, the district judge announced that all counsel could stop by his office and avail themselves of his findings of fact and conclusions of law in the Detroit-only plans of segregation.[26] Such procedures, which will undoubtedly be the subject of appeal by the intervening school districts, demonstrates that intervention in the present litigation would have been, and indeed was in fact, a nullity in view of the actions of the Trial Court.

Traditionally, the Writ of Prohibition and Mandamus have been used in the Federal Courts where a lower Court has refused, or improperly sought, to exercise jurisdiction. While perhaps the Writ has been more commonly utilized in admiralty and criminal cases, its applicability to the present case is unmistakeable. The language of the holding in *Ex Parte, Republic of Peru*, 318 U.S. 577, 582-586, is particularly helpful.

> "Under the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained. *The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior*

[25] Ironically, since July, 1971, the Trial Court has had before it a Motion to add 86 school districts as parties. For unknown reasons, it wass not decided. It is referred to in Exhibit B, page 28. It was withdrawn by the moving party, Intervenor Magdowski, on June 14, 1972, in open Court. (No transcript attached.)

[26] Reference Exhibit C.

court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of [February 13] 1925, 43 Stat 936, c 229, 11 USCA § 47, 3 FCA title 11, § 47 and since. In all these cases (cited in notes 1 and 2), the appellate, not the original, jurisdiction of this Court was invoked and exercised.

"The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court, Re Skinner & E. Corp. 265 US 86, 95, 96, 68 L ed 912, 915, 44 S Ct 446; Ex parte Monterey, 269 US 527, 70 L ed 395, 46 S Ct 16; Maryland v. Soper, 270 US 9,29, 70 L ed 449, 456, 46 S Ct 185; United States ex rel. Greathouse v. Dern, 289 US 352, 359, 77 L ed 1250, 1254, 53 S Ct 614; and are usually denied where other adequate remedy is available. Ex parte Baldwin, 291 US 610, 78 L ed 1020, 54 S Ct 551, 24 Am Bankr Rep (NS) 487. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on district appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (Ex parte Apex Electric Mfg. Co. 274 US 725, 71 L ed 1342, 47 S Ct 766; Ex parte Daugherty, 282 US 809, 75 L ed 726, 51 S Ct 180; Ex parte Krentler-Arnold Hinge Last Co. 286 US 533, 76 L ed 1273, 52 S Ct 621), which likewise has power under § 262 of the Judicial Code, 28 USCA § 377, 8 FCA title 28, § 377 to issue the writ. McClellan v. Carland, 217 US 268, 54 L ed 762, 30 S Ct 501; Adams v. United States, 317 US 269, ante, 268, 63 S Ct 236, 143 ALR 435.

"After a full review of the traditional use of the common-law writs by this Court, and in issuing a writ of mandamus, in aid of its appellate jurisdiction, to compel a district judge to issue a bench warrant in conformity to statutory requirements, this Court declared in Ex parte United States, 287 US 241, 248, 249, 77 L ed 283, 286, 287, 53 S Ct 129: 'The rule deducible from the later decisions, and which we now affirm, is, that this court has full power in its discretion to issue the writ of man-

damus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals – this court having ultimate discretionary jurisdiction by certiorari – but *that such power will be exercised only where a question of public importance is involved*, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in such exceptional cases.'

"We conclude that we have jurisdiction to issue the writ as prayed."

Ex Parte, Republic of Peru, supra Emphasis added

While *Peru*, supra, was an original application to the Supreme Court, the criteria set forth in the opinion for issuance of the writ is applicable to the instant case before this Appellate Court. Indeed, the circumstances of the present litigation are even more compelling.

CONCLUSION

In *Brown I*, supra, the Supreme Court declared that a School District which is deliberately operated to foster segregated schools offends federally guaranteed rights under the Fourteenth Amendment.

The Trial Court below decided, rightly or wrongly, that only the City of Detroit School District had failed to maintain the required unitary system and that the State-Defendants, so-called, had abetted or acquiesced in the deprivation of those rights.

Unlike other cases which have come before the Appellate Courts of this country, such as *Alexander* -vs- *Holmes County Board of Education*, 396 US 19 (1969), there is no finding that the petitioning school districts have ever operated their schools in violation of those rights which *Brown I* sought to protect.

The Trial Court, as previously noted, has decried any findings that the petitioning school districts contributed to its decision

with respect to the Detroit School District. As noted, by the 4th Circuit in *Bradley* -vs- *Richmond*, supra, -F2d-, geographically and politically independent school districts which have not been established or maintained with intent of denying of circumventing any federally protected right, the State's right to control its own internal government is absolute. The Trial Court has conceded that there is no evidence that the petitioning school districts were established to circumvent any such federally guaranteed right. It is submitted that notwithstanding those findings, 52 school districts of the State of Michigan including the petitioners have been included in an Order without parallel in judicial precedent, without notice and without a hearing.

It is reiterated; what is here involved is a calculated overreaching by the Trial Court of the jurisdictional and due process requirements to which all litigants are entitled. No right of appeal is afforded to non-parties. The Order of June 14 is sweeping and all-encompassing, as to Districts within the de-segregation area. The extraordinary circumstances of this case require the extraordinary remedy of a Writ of Prohibition to set aside and quash the Orders of the Trial Court as to these petitioners.

RELIEF REQUESTED

Petitioners respectfully request that the Appellate Court treat this matter as an emergency Petition for Writ of Prohibition and Mandamus. The Order of the District Court directs the reassignment of pupils between the Detroit School District and the 52 affected school districts for the fall term of 1972. The commencement of that term is something less than seventy-five (75) days away as this Petition is written. Notwithstanding that said litigation was commenced in August of 1970, has been appealed to the Circuit Court of Appeals not less than twice, and is now pending on a request for certiorari to the United States Supreme Court, the Trial Court has directed the immediate implementation of the de-segregation plan for fall of 1972 as to certain grades within the affected school districts.[27]

As previously noted, the petitioners are directed to expend funds and cooperate with said de-segregation panel in preparation

[27] Reference Exhibit E, p. 4, ¶4B; See also Exhibit D, p. 28, ¶H 84, et seq.

of a plan of de-segregation and in effect, to be part and parcel of the judicial plan for eventual dismemberment of the affected school districts.

Notwithstanding the pendency of this cause for well on to two (2) years, the Court now would have all proceed at a rapid pace to insure that de-segregation will commence in grades kindergarten through six, eight or nine, in as many clusters as possible.[28] Petitioners show that there can be no justification for this judicial rush to the busses in view of the substantial legal questions presented to this Court and more importantly, to the need for careful examination of all questions involved before one judge compels the imposition of an Order which cannot help but disrupt the orderly operation of some 52 school districts and disrupt some 800,000 children and their parents. Certainly, a case of this magnitude deserves the preferred and immediate attention of this Court.

* * *

WHEREFORE, your petitioners, being without other appropriate relief in the premises, respectfully pray that an emergency Writ of Prohibition or alternately a Writ of Mandamus issue out of this Court directed to the Honorable Stephen J. Roth, District Judge, for the Eastern District of Michigan, Southern Division, as follows:

a. That said Writ prohibit the Honorable Stephen J. Roth, or any persons acting for or on behalf of said District Judge, from enforcing or implementing or in any manner proceeding under the ruling and Order for establishment of de-segregation area dated June 14, 1972 in the cause of *Bradley* -vs- *Milliken*, et al, civil action No. 35257 in the United States District Court for the Eastern District of Michigan, Southern Division, as to these petitioners; and,

b. That said Writ require and direct the entry of an Order by said District Judge, that said Order of June 14, 1972, identified in subparagraph a, be quashed as to these petitioners; and,

c. That said Writ of Prohibition or alternately Writ of Mandamus prayed for herein be issued as an emergency Writ and be

[28] Reference Exhibit E, p. 3, ¶1.

directed to said District Judge forthwith for compliance with the terms hereof; and,

d. That for the reasons and grounds stated herein, this matter be set for immediate hearing before the Honorable Court; and,

e. That your petitioners have such further and different relief as may be required in the premises and be deemed just and equitable under the circumstances set forth herein.

DELL, SHANTZ, BOOKER AND SCHULTE

By: /s/ John F. Shantz

By: /s/ Harry N. Dell

222 Washington Square Building
Royal Oak, Michigan 48067; LI 1-2150

Attorneys for West Bloomfield School District, 3250 Commerce Road, Orchard Lake, Michigan; and

Clarenceville School District
28830 West Eight Mile Road,
Farmington, Michigan 48024
Petitioners

Dated: June 30, 1972

Appendix C

#72-1670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN, and CLARENCEVILLE SCHOOL DISTRICT OF OAKLAND AND WAYNE COUNTIES, MICHIGAN, **Petitioners** **v.** **THE HONORABLE STEPHEN J. ROTH, District Judge for the Eastern District of Michigan, Southern Division,** **Respondent**	**ORDER**

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges

Upon consideration, IT IS ORDERED that the application for writ of mandamus and prohibition is denied and the petition is dismissed.

This order is entered without prejudice to the right of the petitioner School Districts to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

Filed July 17, 1972

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE 6th CIRCUIT

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN and CLARENCEVILLE SCHOOL DISTRICT OF OAKLAND AND WAYNE COUNTIES, MICHIGAN, Petitioners, -vs- THE HONORABLE STEPHEN J. ROTH, District Judge for the Eastern District of Michigan, Southern Division, Respondent.	Docket No.72-1670

PETITION FOR REHEARING OF
PETITION FOR WRIT OF PROHIBITION
AND MANDAMUS AND SUGGESTION OF IN BANC HEARING

DELL, SHANTZ, BOOKER & SCHULTE
222 Washington Square Building
Royal Oak, Michigan 48067
Telephone: (313) 541-2150

IN THE UNITED STATES COURT OF APPEALS
FOR THE 6th CIRCUIT

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN and CLARENCEVILLE SCHOOL DISTRICT OF OAKLAND AND WAYNE COUNTIES, MICHIGAN, **Petitioners,** **-vs-** **THE HONORABLE STEPHEN J. ROTH, District Judge for the Eastern District of Michigan, Southern Division,** **Respondent.**	**Docket No. 72-1670**

PETITION FOR REHEARING OF PETITION FOR WRIT OF PROHIBITION AND MANDAMUS AND SUGGESTION OF IN BANC HEARING

NOW COMES WEST BLOOMFIELD SCHOOL DISTRICT and CLARENCEVILLE SCHOOL DISTRICT by their attorneys, Dell, Shantz, Booker and Schulte, and in this Petition for Rehearing of Petition for Writ of Prohibition and Mandamus do say:

1. On July 1, by certified mail, the Petitioning School Districts have heretofore filed a Petition for Writ of Prohibition in the above entitled matter, and Proof of Service with respect thereto has been filed in this cause.

2. On July 17, 1972, this Court entered its order denying said Petition without prejudice to the right to intervene in the case of *Ronald Bradley, et al* -vs- *William Milliken, et al,* being civil action No. 35257 in the United States District Court for the Eastern District of Michigan, Southern Division.

3. In its pronouncement from the Bench on July 17, 1972, the Circuit Court of Appeals, speaking through the Honorable Judge

Phillips, denied the Petition for Writ of Prohibition without prejudice to intervention in the lower court for "purposes of appeal". No such limitation on the Petitioners' intervention appears in the Order of July 17, 1972.

4. On July 20, 1972, the Trial Court certified as final orders certain rulings and orders of the Trial Court as more specifically identified in the copy of said Order attached hereto as Exhibit A. Appeals have been filed from the Orders of the Trial Court.

5. On July 20, 1972, this Honorable Court issued its Order granting a stay of proceedings and ordering briefs on appeal and hearing on appeal for August 24, 1972, a copy of said Order is attached hereto as Exhibit B. Petitioners respectfully suggest that the posture of the case below, *Bradley, et al* -vs- *Milliken, et al,* supra, has changed markedly by virtue of said Order of July 20th of the Trial Court (Exhibit A) and the Order of this Court of like date (Exhibit B).

6. Petitioners show that for all practical purposes the litigation in the Trial Court has been concluded. Intervention in said cause in its present posture and in view of the circumscribed rights imposed upon the intervening suburban school districts (Allen Park, et al) by the Trial Court by its Order of March 15, 1972, would be a meaningless gesture and a monument to futility.

7. Petitioners show that this Court will on August 24, 1972, have before it all parties to the cause below, Plaintiffs, Defendants and Intervenors. The Petitioners, West Bloomfield School District and Clarenceville School District, which have not intervened hereto, have raised questions in the original Petition for Writ of Prohibition and Mandamus, filed July 1, 1972, which are related to but distinct from, those raised by suburban school districts which intervened in said litigation. Your Petitioners should have the opportunity for a hearing before this Court with respect to the serious and basic jurisdictional issues raised in said Petitions. Petitioners should not be required, in view of the present posture of this case, to apply to the Trial Court for leave to intervene.

8. In addition to the foregoing, Petitioners show that the time schedule on the appeals of *Bradley* -vs- *Milliken, et al,* Sixth Circuit Court of Appeals Docket No. 72-8002, as established by this

Court requiring briefs by August 21 and argument on August 24, is such as to make application to intervene in the Trial Court impractical, if not impossible. Mechanically, intervention at this date would not permit sufficient time for the filing of the necessary Motion to Intervene, hearing and preparation of appeal, assuming arguendo, that the Trial Court granted such intervention. In the event the Trial Court denied the Motion to Intervene, Petitioners would not have sufficient time in which to appeal such decision to the Court before arguments in the case of *Bradley* -vs- *Milliken*, supra, Docket No. 72-8002, in this Court. Petitioners show that given the present posture of the case and the time schedule for appeals established by this Court, intervention in the Trial Court below is an illusory and wholly inadequate procedure. The scope of the litigation, and the critical and basic questions of jurisprudence raised herein requires that the Petition for Writ of Prohibition and Mandamus be entertained by this Court. Petitioners respectfully submit that this Petition may be heard contemporaneously with the appeals now docketed in *Bradley* -vs- *Milliken, et al*, Sixth Circuit Court of Appeals Docket No. 72-8002.

9. Petitioners show that Plaintiffs apparently claim that Petitioning School Districts, West Bloomfield School District and Clarenceville School District, raise no issues not raised by other Defendants. Petitioners reject such contention. Petitions specifically show that said Petition and Affidavits attached thereto demonstrate that said Petitioning School Districts were not created from the Detroit School District; were not created to preserve or foster segregation or other invidious purpose as evidenced by the date of creation of said Districts as shown by said Petition. Circumstance such as these demonstrates the need for this Court to take jurisdiction of and favorably act upon the Petition for Writ of Prohibition heretofore filed by said School Districts.

10. Petitioners respectfully suggest the appropriateness of in banc hearing with respect to this Petition for Rehearing, and/or the Petition for Writ of Prohibition and Mandamus.

11. This Petition for Rehearing is filed in accordance with Federal Rules App Proc 40 and 35, respectively.

WHEREFORE, Petitioners pray:

a. That a rehearing of the Petition for Writ of Prohibition and Mandamus heretofore filed by West Bloomfield School District and Clarenceville School District, be granted; and,

b. That said Petition be set for hearing on August 24, 1972, or such other date as may be convenient to the Court, if deemed appropriate by this Honorable Court; and,

c. That the Writ issue as prayed for in said Petition for Writ of Prohibition and Mandamus heretofore filed in this case.

DELL, SHANTZ, BOOKER AND SCHULTE

Dated: July 26, 1972:

By: JOHN F. SHANTZ
222 Washington Square Building
Royal Oak, Michigan 48067
Telephone: 541-2150

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., **Plaintiffs** **v.** **WILLIAM G. MILLIKEN, et al.,** **Defendants** **DETROIT FEDERATION OF TEACHERS LOCAL #231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,** **Defendant-Intervenor** **and** **DENISE MAGDOWSKI, et al.,** **Defendants-Intervenor** ***et al.***	**CIVIL ACTION** **No. 35257**

ORDER

At a session of said court held in the Federal Building, City of Flint, County of Genesee, on this 19th day of JULY, A.D. 1972.

PRESENT: HONORABLE STEPHEN J. ROTH
United States District Judge

This court having heard oral motions on July 19, 1972, for entry of judgments in accordance with the provisions of Fed. R. Civ. P. 54(b) and for certification under the provisions of 28 U.S.C. 1292(b) in connection with certain orders and rulings of the court heretofore entered; the court determines for the purpose of appeal, and subject to this court's statements at the hearing on July 19, 1972, that there is no just reason for delay and that each of the following orders:

EXHIBIT A

1. Ruling on Issue of Segregation, September 27, 1971;

2. Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, March 24, 1972;

3. Findings of Fact and Conclusions of Law on Detroit-only Plans of Desegregation, March 28, 1972;

4. Ruling on Desegregation Area and Development of Plan, and Findings of Fact and Conclusions of Law in Support thereof, June 14, 1972; and

5. Order for Acquisition of Transportation, July 11, 1972 shall be deemed final orders under Rule 54(b) of the Federal Rules of Civil Procedure and the court certifies the issues presented therein under the provisions of 28 U.S.C. 1292(b).

UNITED STATES DISTRICT JUDGE

DATE: July 20, 1972
TIME: 8:30 a.m.

Appendix D

#72-8002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD BRADLEY, et al, **Plaintiffs-Appellants** **v.** **WILLIAM G. MILLIKEN, et al,** **Defendants-Appellants** **and** **DETROIT FEDERATION OF TEACHERS LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,** **Defendant-Intervenor** **and** **DENISE MAGDOWSKI, et al,** **Defendants-Intervenors**	**ORDER**

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

The District Court has certified that certain orders entered by him in this case involve controlling questions of law, as provided by 28 U.S.C. § 1292 (b), and has made a determination of finality under Rule 54(b), Fed. R. Civ. P.

This court concludes that among the substantial questions presented there is at least one difficult issue of first impression which never has been decided by this court or the Supreme Court. In so holding we imply nothing as to our view of the merits of this appeal. We conclude that an immediate appeal may materially advance the ultimate termination of the litigation. Accordingly, it is

ORDERED that the motion for leave to appeal be and hereby is granted.

It is further ORDERED that the appeal in this case be advanced

on the docket of this court and scheduled for hearing Thursday, August 24, 1972, at 9 a.m. The appendix and simultaneous briefs of all parties shall be filed not later than 25 days after the entry of this order. Reply briefs shall be filed not later than August 21, 1972. Typewritten appendix and briefs may be filed in lieu of printed briefs, together with ten legible copies produced by Xerox or similar process. An appendix must be filed. The court will not entertain a motion to hear the appeal on the original record.

The motion for stay pending appeal having been considered, it is further ORDERED that the Order for Acquisition of Transportation, entered by the District Court on July 11, 1972, and all orders of the District Court concerned with pupil and faculty reassignment within the Metropolitan Area beyond the geographical jurisdiction of the Detroit Board of Education, and all other proceedings in the District Court other than planning proceedings, be stayed pending the hearing of this appeal on its merits and the disposition of the appeal by this court, or until further order of this court. This stay order does not apply to the studies and planning of the panel which has been appointed by the District Court in its order of June 14, 1972, which panel was charged with the duty of preparing interim and final plans of desegregation. Said panel is authorized to proceed with its studies and planning during the disposition of this appeal, to the end that there will be no unnecessary delay in the implementation of the ultimate steps contemplated in the orders of the District Court in event the decision of the District Court is affirmed on appeal. Pending disposition of the appeal, the defendants and the School Districts involved shall supply administrative and staff assistance to the aforesaid panel upon its request. Until further order of this court, the reasonable costs incurred by the panel shall be paid as provided by the District Court's order of June 14, 1972.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

Appendix E

No. 72-1670
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN, AND CLARENCEVILLE SCHOOL DISTRICT OF OAKLAND AND WAYNE COUNTIES, MICHIGAN, Petitioners, v. THE HONORABLE STEPHEN J. ROTH, District Judge for the Eastern District of Michigan, Southern Division, Respondent.	ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

No judge of this court having suggested rehearing in banc, the petition for rehearing has been considered by the original hearing panel.

It is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ JAMES A. HIGGINS
Clerk

Filed August 24, 1972

APPENDIX F.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The provisions of the Constitution of the United States at issue herein are as follows:

ARTICLE III

SECTION 2. The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different states, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The provisions of the Constitution of the State of Michigan at issue are as follows:

ARTICLE VIII

SECTION 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, rac color or national origin.

3. The Statute of the United States in issue is:

28 United States Code 2281

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

4. The Statute of the State of Michigan at issue is as follows:

Act 269 of Public Acts of Michigan of 1955, as amended (MCLA 340.1, et seq).

a. Section 352 (MCLA 340.352, MSA 15.3352)

"Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gift, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district existing within the same territorial limits and shall be vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years; and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law."